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Opinion on remand

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

BRIAN J. McMAHON, Plaintiff and Appellant, v. BOARD OF TRUSTEES OF THE EL CAMINO COMMUNITY COLLEGE DISTRICT, Defendant and Respondent.	B150910 (Los Angeles County Super. Ct. No. BS047821)

APPEAL from a judgment of the Superior Court of Los Angeles County. Dzintra Janavs, Judge. Affirmed in part, reversed in part, and remanded with directions.

Brian J. McMahon, in pro. per.; Gronemeier & Associates, Dale L. Gronemeier, and Ellen Bower, for Plaintiff and Appellant. [Retained.]

Liebert Cassidy Whitmore and Mary L. Dowell for Defendant and Respondent.

Appellant Brian J. McMahon (McMahon) appeals the judgment following the trial court's denial of his petition for writ of mandate challenging the decision of respondent Board of Trustees of the El Camino Community College District (the District) to dismiss him from his tenured faculty position due to evident unfitness for service. McMahon contends that the trial court erred when it ruled that McMahon's termination was supported by the administrative record, and that McMahon's due process rights to a predeprivation hearing had not been violated. We conclude that McMahon has not demonstrated error on the first point, but has as to the second because the District failed to comply with *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 215 (*Skelly*). Although McMahon is not entitled to reinstatement, he is entitled to back pay pursuant to *Barber v. State Personnel Bd.* (1976) 18 Cal.3d 395, 402 (*Barber*) and *Williams v. City of Los Angeles* (1990) 220 Cal.App.3d 1212, 1217 (*Williams*). Accordingly, we affirm in part, reverse in part, and remand for further proceedings on the back pay issue. The trial court shall award McMahon his back pay from February 16, 1997, to October 1, 1997, and deny all other relief requested.

PROCEDURAL AND FACTUAL HISTORY

1. *McMahon's employment*.

Beginning in the Fall of 1985, the District employed McMahon as an instructor in the auto collision repair and painting program in the District's industry and technology division.

2. *McMahon's dismissal and request for a hearing.*

On November 19, 1996, the District's president recommended that its board of trustees dismiss McMahon due to "dishonesty, evident unfitness for service, and persistent violation of District regulations."[1]

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[1] Education Code section 44932, subdivision (a) provides: "No permanent employee shall be dismissed except for one or more of the following causes: [¶] . . . [¶] (3) Dishonesty. [¶] . . . [¶] (5) Evident unfitness for service. [¶] . . . [¶] (7) Persistent violation of or refusal to obey the school laws of the state or reasonable regulations

The District served McMahon with a letter that stated: "You are notified that you are dismissed from employment with the El Camino Community College District effective ninety days from November 18, 1996. Unless a written request for a hearing signed by you or on your behalf is delivered or mailed to the El Camino Community College District within thirty (30) days of the date the Statement of Decision was personally served on you or mailed to you, the El Camino Community College District will make your dismissal effective without a hearing. The request for a hearing may be made by delivering or mailing the enclosed form entitled Notice of Objection to Decision, or by delivering or mailing a notice of defense as provided by Section 11506 of the Government Code to President Thomas J. Fallo, El Camino Community College District." The District also served McMahon with a statement of decision to dismiss and a statement of charges, copies of various sections of the Education Code, and a blank notice of objection to the statement of dismissal. The president's statement of charges contained 24 separate charges of misconduct.

McMahon served an objection, thereby requesting a hearing. His dismissal was effective on February 16, 1997.

3. *The administrative proceedings*.

The hearing was held in May 1997 before David B. Rosenman (Rosenman), Administrative Law Judge of the Office of Administrative Hearings, who considered evidence submitted through oral testimony, documents, and stipulation. At the outset, McMahon was represented by counsel, but his counsel withdrew due to a breakdown in the attorney-client relationship. Thereafter, McMahon represented himself in the proceedings.

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prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him or her."

The District put on its case, and McMahon cross-examined the District's witnesses. After the District rested, McMahon presented a limited defense, calling witnesses to provide testimony on only a few points. On what became the last day of the hearing, McMahon announced that he would not be testifying himself, and that he had decided not to call any further witnesses. In the end, McMahon did not present evidence to explain or deny much of the admitted evidence.

On October 1, 1997, Rosenman issued a 15-page written decision setting forth, inter alia, the following findings of fact: (1) On November 25, 1992, McMahon referred to a disabled temporary employee, George Schwinger (Schwinger), as "a cripple" in the presence of other employees;[2] (2) in April 1993, McMahon "took Schwinger's key ring and shop keys, which Schwinger needed to be able to do his job. [McMahon] broke the leather hook which was attached to Schwinger's keys;" (3) in 1994, McMahon became irate and shouted at Lynn Clemons (Clemons), Ray Lovell (Lovell), and a student assistant, telling them to leave the ACR/P laboratory without allowing them to explain that they had permission to conduct a survey regarding handicap access; (4) in the Spring 1995 semester, McMahon allowed two people not enrolled in class to work on cars during class session, which was a violation of division and department policy; (5) on Saturday, May 13, 1995, Dean Way discovered McMahon working on a car in the ACR/P laboratory without permission; (6) in the Fall 1995 semester, McMahon harassed David Stovall (Stovall), a night custodian, attempting to force Stovall to sign some papers. Stovall was transferred so that he would no longer have to work near the auto shop area; (7) after Harry Stockwell (Stockwell) and a police officer questioned McMahon about an unidentified individual Stockwell had seen with a socket wrench in the automotive technology laboratory, McMahon became very agitated and yelled at

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[2] Rosenman noted: "Schwinger had previously told [appellant] that he preferred the word 'cripple' to 'disabled' or 'handicapped' to describe his condition; nevertheless Schwinger was upset by the event and complained in writing to his supervisor. [¶] Despite [appellant's] attempt at portraying the incident as good-natured ribbing, his conduct was offensive."

Stockwell and the officer; (8) in the Fall 1995 semester, McMahon was assigned to conduct a peer evaluation of an adjunct faculty member, but McMahon did not complete the assignment despite repeated written requests to do so; (9) on November 7, 1995, McMahon attempted to claim sick leave for absences that were not caused by illness; (10) on November 30, 1995, McMahon smashed a mechanic's creeper with a sledgehammer while in full view of students and classified employees; (11) on December 5, 1995, McMahon told toolroom attendants that they were not needed, and that their salaries were a waste of money; (12) on December 5, 1995, without authorization, McMahon cut the electrical cords off a heat lamp and an electric polisher; (13) in February 1996, McMahon had students dismantle a donated Buick Regal even though he had not consulted with the dean or other faculty; (14) on July 22, 1996, McMahon was discovered in the auto body shop without authorization even though he was on administrative leave; (15) on two other occasions, McMahon entered the campus without permission; and (16) on September 16, 1996, McMahon went to the auto body shop. Although he had made prior arrangements, he did not wait for his police officer escort. "While there, [McMahon] attempted to push past teacher Harry Stockwell and enter the toolroom. . . . When Stockwell attempted to deter him from entering the toolroom, [McMahon] began to yell and scream at him that he . . . could go wherever he wanted and for Stockwell to get out of his way. . . . When Campus Police Officer Starkey arrived, [McMahon] demanded that Officer Starkey arrest Stockwell. [McMahon] then advanced on and charged at Stockwell, lowered his shoulder and jammed his shoulder and elbow into Stockwell, forcing him backwards into the toolroom. [¶] [McMahon's] conduct was purposefully harmful, designed to provoke Stockwell, and confrontational. There was no justification for this conduct."

In his final finding of fact, Rosenman stated that "[t]he cumulative effect of the facts found above is the conclusion that [McMahon] continued employment poses a danger to the faculty, employees and administrators of the District. His conduct is attributable to a defect in temperament. . . . [McMahon] demonstrated a pattern and course of misconduct that prevents the District from being able to work with [McMahon] for the best interests of the students."

Rosenman concluded that the District had cause to terminate McMahon for evident unfitness for service and persistent violation of school regulations. He stated: "The evidence clearly established that several District teachers and employees were adversely affected by [McMahon's] conduct, and it is inferred that students as well were adversely affected by conduct such as watching [McMahon] destroy tools and equipment, and being involved in other incidents. Several witnesses stated a desire not to work with [McMahon] in the future, and might do so only if ordered by a superior. Some said they would not follow such an order. Therefore, the degree of the adverse effect on some was extreme. There is no doubt that, in the aggregate, the evidence of [McMahon's] acts demonstrates a clear and obvious inability to remain a teacher for the District, for the reasons set forth in Finding 29. [McMahon's] cumulative pattern of misconduct is similar to that in the [*Woodland Joint Unified School District v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429 (*Woodland Joint USD*)] case in that it appears to have been motivated in part by the contempt and animus that [McMahon] felt for the administration and some of its employees and his fellow teachers. [Citation.] Yet in some other incidents (e.g., the police dispatcher and Clemons and Lovell), he had no prior dealings with the people involved. [McMahon's] conduct is ultimately traceable to a defect in temperament."

At the end of the decision, under a heading titled Other, Rosenman added that "[t]he Findings and Determinations above should not be misconstrued as any negative evaluation of [McMahon's] teaching abilities. [McMahon] presented evidence from former students that he is a better than average teacher. . . . [¶] Many of the instances

which form the basis of his dismissal relate to [McMahon's] difficulties with specific teachers and administrators, and with the District itself, but do not reflect an inability to be an effective teacher in his chosen area of expertise. [¶] Nevertheless, his proven inability to work effectively with District personnel or follow reasonable District policy justifies [McMahon's] dismissal."

4. *McMahon's petition for writ of mandate*.

McMahon challenged Rosenman's ruling on substantive and due process grounds by filing a petition for writ of mandate. After the matter came on for trial, the trial court entered judgment in favor of Rosenman and the District.

The trial court stated in part: "The weight of evidence supports [Rosenman's] findings and, based on said findings, there was no abuse of discretion in terminating petitioner from his tenure position in the El Camino Community College's Auto Collision Repair and Painting program effective February 16, 1997. [¶] The findings and evidence are detailed in Administrative Law Judge David Rosenman's thoughtful 15 page decision, as is his application of the relevant law to the facts. [¶] Petitioner represented himself ably, better than many a lawyer, in the administrative proceedings as well as in Court. He cross-examined witnesses competently and his legal arguments were cogent. For reasons of his own, he chose not to testify in the administrative proceedings. [¶] This left much to speculation and a gap in the evidence too wide to be filled by such inferences as could be drawn from some of the evidence. The impact of petitioner's failure to testify was noted by the administrative law judge. [¶] The Schwinger incidents in 1992 and 1993, Clemons and Lowell incident in 1994, petitioner's numerous actions in 1995, including the Stovall incident and his conduct as to Stockwell in 1996, indicate a continuous and escalating difficulty in dealing with his co-workers and superiors. [¶] The administrative law judge properly applied the relevant law and concluded that cause existed to dismiss petitioner 'pursuant to Section 88732(e) for evident unfitness for service.' [¶] Just like the administrative law judge, this Court acknowledges petitioner's ability and qualifications as a teacher. Unfortunately, the record supports the conclusion

that he was not terminated because of retaliation for whistle blowing, which occurred long before the termination, but because he was unable to work effectively with the District personnel and follow the District's policies." Additionally, the trial court found no merit to McMahon's due process arguments.

This timely appeal followed.[3]

5. *The proceedings on appeal*.

The parties briefed the dismissal and due process issues, but neither McMahon nor the District briefed the issue of the proper remedy in the event that the District in fact violated McMahon's due process rights. Subsequently, we filed our opinion reversing the judgment on due process grounds and instructing the trial court to order the District to set aside its decision to dismiss McMahon.

Arguing, in part, that McMahon was provided with predeprivation due process, the District filed a petition for rehearing. In making this argument, the District claimed that the transcript from the administrative hearing demonstrates that Sandra Lindoerfer tried to meet with McMahon to discuss the charges against him. Moreover, the District asserted, Lindoerfer testified that McMahon refused her invitations. But the alleged Lindoerfer evidence was not included in the appellate record. McMahon submitted only small excerpts of the transcript from the administrative record, and the District did not make a motion to augment. We presumed, as we must, that the partial record includes all matters material to this appeal. (See Cal. Rules of Court, rule 52; *Hillman v. Leland E. Burns, Inc.* (1989) 209 Cal.App.3d 860, 864.)

We denied the District's petition for rehearing.

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[3] In connection with this appeal, McMahon asks us to take judicial notice of: (1) the decision by Administrative Law Judge Roy W. Hewitt (Hewitt) denying McMahon's appeal from the denial of his application for disability retirement due to Rosenmen's finding that appellant is unfit to serve; and (2) a brief respondent filed with the Ninth Circuit. As requested, we take judicial notice. However, we note that these documents do not aid McMahon's cause.

Thereafter, the District filed a petition for review with the California Supreme Court. In that petition, the District raised the remedy issue for the first time, citing *Barber* and *Williams*. The California Supreme Court granted the petition, and then transferred the matter back to us with an order to vacate our decision and to reconsider the cause in light of *Barber* and *Williams*.

STANDARD OF REVIEW

On a petition for writ of mandate following administrative proceedings to dismiss a teacher, the superior court exercises independent judgment on the evidence. (Ed. Code, § 87682.)[4] Following the superior court's independent review, the scope of review on appeal is limited. "'An appellate court must sustain the superior court's findings if substantial evidence supports them. In reviewing the evidence, an appellate court must resolve all conflicts in favor of the party prevailing in the superior court and must give that party the benefit of every reasonable inference in support of the judgment. When more than one inference can be reasonably deduced from the facts, the appellate court cannot substitute its deductions for those of the superior court. [Citations.]' [Citation.]" (*West Valley-Mission Community College Dist. v. Concepcion* (1993) 16 Cal.App.4th 1766, 1775.)

When "'contention regarding procedural matters presents a pure question of law involving the application of the due process clause, we review the trial court's decision de novo.' [Citation.]" (*Bostean v. Los Angeles Unified School Dist.* (1998) 63 Cal.App.4th 95, 107.)

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[4] All further statutory references are to the Education Code unless otherwise indicated.

DISCUSSION

1. *McMahon failed to demonstrate that the trial court erred in upholding Rosenman's decision.*

McMahon contends we must reverse the trial court because it found him fit to teach, which is necessarily incompatible with any finding that he demonstrates "evident unfitness for service."

We disagree.

a. *McMahon waived his challenge to the sufficiency of the evidence.*

Upon review of the reporter's transcript of the writ hearing, it is apparent that the trial court had the reporter's transcript of the administrative hearing to consider. However, McMahon neglected to include all relevant portions of the reporter's transcript of the administrative hearing in the appellate record. This is fatal to McMahon's position because it precludes us from conducting the necessary substantial evidence review. (See *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132 ["[D]efendants elected not to provide a reporter's transcript of the trial proceedings. Accordingly, they have no basis upon which to argue that the evidence adduced at trial was insufficient to support the trial court's finding that injunctive relief was necessary to prevent a continuation of defendants' unlawful conduct"]; *Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1320 ["Plaintiff has the 'burden of overcoming this presumption by showing error on an adequate record'"].)

As well, we note that McMahon's opening and reply briefs violate California Rules of Court, rule 14(a).[5] McMahon's briefs provide references in the appellate record

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[5] California Rules of Court, rule 14(a) provides: "(a) Contents [¶] (1) Each brief must: [¶] . . . [¶] (C) support any reference to a matter in the record by a citation to the record. [¶] (2) An appellant's opening brief must: [¶] (A) state the nature of the action, the relief sought in the trial court, and the judgment or order appealed from; [¶] (B) state that the judgment appealed from is final, or explain why the order appealed from is appealable; and [¶] (C) provide a summary of the significant facts limited to matters in the record."

to the written decisions issued by Rosenman, Hewitt,[6] and the trial court, but they provide no references to evidence. Furthermore, McMahon simply posits that the trial court erred. Fatally, he makes no attempt to tailor this appeal to the standard of review, i.e., the substantial evidence test.

It is axiomatic that we need not make the arguments McMahon should have made himself. "'The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment. It is entitled to the assistance of counsel. Accordingly every brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration.' [Citation.] [¶] It is the duty of [appellant], not of the courts, 'by argument and the citation of authorities to show that the claimed error exists.' [Citation.]" (*Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1050.)

One final point. We can only conclude that McMahon failed to fulfill his obligation to set forth the evidence fairly. When an appellant challenges a trial court's factual findings, he is "'required to set forth in [his] brief all the material evidence on the point and not merely [his] own evidence.' [Citations.] An appellant's failure to state all of the evidence fairly in [his] brief waives the alleged error. [Citation.]" (*County of Solano v. Vallejo Redevelopment Agency* (1999) 75 Cal.App.4th 1262, 1274.) Although McMahon refers to statements by Rosenman and the trial court regarding McMahon's abilities as a teacher, his briefs omit any reference to the incidents that formed the basis of Rosenman's decision.

b. *Substantial evidence supports the trial court's finding.*

The appellate record, as it currently exists, contains substantial evidence that McMahon exhibited evident unfitness for service.

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[6] Hewitt's opinion contains a finding of fact that refers to Rosenman's assessment that appellant's dismissal does not reflect an inability an appellant's part to be an effective teacher.

In reviewing the record for the existence of substantial evidence, we "*look to the entire record of the appeal*, and *will not* limit [our] appraisal 'to isolated bits of evidence selected by the respondent.' [Citations.] [¶] And the existence of such 'substantial evidence' will be determined as follows: When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. *If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion*. [Citations.]" (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.)

Evident unfitness for service "properly means 'clearly not fit, not adapted to or unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies.' Unlike 'unprofessional conduct,' 'evident unfitness for service' connotes a fixed character trait, presumably not remediable merely on receipt of notice that one's conduct fails to meet the expectations of the employing school district." (*Woodland Joint USD, supra*, 2 Cal.App.4th at p. 1444, fn. omitted.)

The *Woodland Joint USD* court indicated that any tribunal or court called upon to determine whether a teacher demonstrates evident unfitness to serve should apply the factors set forth in *Morrison v. State Board of Education* (1969) 1 Cal. 3d 214 (*Morrison*), which are: (1) the likelihood that the conduct may have adversely affected students or fellow teachers, (2) the degree of such adversity anticipated, (3) the proximity or remoteness in time of the conduct, (4) the type of teaching certificate held by the party involved, (5) the extenuating or aggravating circumstances, if any, surrounding the conduct, (6) the praiseworthiness or blameworthiness of the motives resulting in the conduct, (7) the likelihood of the recurrence of the questioned conduct, and (8) the extent

to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers. (*Id*. at pp. 229-230.) "These criteria must be analyzed to determine, as a threshold matter, whether the cited conduct indicates unfitness for service. [Citation.] If the *Morrison* criteria are satisfied, the next step is to determine whether the 'unfitness' is 'evident'; i.e., whether the offensive conduct is caused by a defect in temperament." (*Woodland Joint USD*, *supra*, 2 Cal.App.4th at p. 1445.)

Under *Woodland Joint USD*, our task is to review the record to determine whether substantial evidence supports a finding that McMahon's conduct was likely to recur and is traceable to a defect in temperament. Also, we must assess whether, in the aggregate, the evidence shows that McMahon's retention would "pose a significant danger of psychological harm to students and fellow teachers. [Citation.]" (*Woodland Joint USD*, *supra*, 2 Cal.App.4th at p. 1456.) Finally, we must examine how McMahon's retention would affect any other person who would be affected by his actions as a teacher, such as custodians, tool room attendants, and the like. (See *Morrison*, *supra*, 1 Cal.3d at p. 235.) In short, we must assess the affect of McMahon's retention on all people at his former campus, not just students who make take a class from McMahon.

Significantly, McMahon does not dispute the findings of fact regarding the incidents detailed in the written decisions issued by Rosenman and the trial court. We accept as true factual findings that are undisputed, uncontradicted or unimpeached. (See *Ordorica v. Workers' Comp. Appeals Bd.* (2001) 87 Cal.App.4th 1037, 1046.) Based on the undisputed facts in the record, we can only conclude that there was substantial evidence to support a finding that McMahon has a defect in temperament justifying his dismissal. The evidence establishes that McMahon will resort to violence if he is angered (i.e., the last Stockwell incident), he acts with animus and disrespect toward fellow employees, he has a disregard for the District's regulations, and he does not recognize the sanctity of the District's property.

That Rosenman and the trial court acknowledged McMahon's ability and qualifications as a teacher do not compel a different result. These acknowledgments are not evidence. Even if they did constitute evidence, these acknowledgments would merely conflict with the evidence that McMahon exhibited evident unfitness to serve. Pursuant to the substantial evidence test, we would have to resolve this hypothetical conflict in favor of the trial court's findings.

2. *The District violated McMahon's right to predeprivation due process.*

McMahon contends that the District terminated him without due process. On this issue, we agree.

The due process clauses of the federal and state Constitutions provide that a person may not be deprived of life, liberty, or property without due process of law. (Cal. Const., art. I, § 7, subd. (a); U.S. Const., 14th Amend., § 1.)

In *Gilbert v. Homar* (1997) 520 U.S. 924, 928-929 (*Gilbert*), the Supreme Court noted that "public employees who can be discharged only for cause have a constitutionally protected property interest in their tenure and cannot be fired without due process." Section 87732 provides that a regular employee shall not be dismissed except for specified causes. There is no dispute that McMahon is a regular employee and that he accordingly has a property interest in his tenure entitling him to due process before termination.

The pivotal question presented by this appeal is whether the process McMahon received was sufficient.[7]

We begin with *Skelly*, in which our Supreme Court stated: "It is clear that due process does not require the state to provide the employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action. However, at least six justices on the high court agree that due process does mandate that the employee be

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[7] *Barber* and *Williams* are predeprivation due process cases. Because the Supreme Court directed us to vacate our prior opinion and reconsider this cause in light of those

accorded certain procedural rights before the discipline becomes effective. As a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline." (*Skelly, supra,* 15 Cal.3d at p. 215.)

Ten years later, in *Cleveland Bd. of Education v. Loudermill* (1985) 470 U.S. 532, 542, footnote omitted (*Loudermill*), the United States Supreme Court stated: "We have described 'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.' [Citations.] This principle requires 'some kind of a hearing' prior to the discharge of an employee who has a constitutionally protected property interest in his employment." The court once against clarified that a hearing need not be elaborate. (*Loudermill*, at p. 545.) In fact, in the context of public employment, "the pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions -- essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. [Citation.]" (*Id*. at pp. 545-546.)

In 1997, the United States Supreme Court indicated that an employee is not always entitled to a predeprivation hearing. In *Gilbert*, the plaintiff was employed as a police officer at a state university. While at the home of a friend, he was arrested by state police during a drug raid. Later that day, the plaintiff was charged with various drug offenses. Upon learning of the arrest, the university administration immediately suspended the plaintiff without pay. A month later, the university demoted the plaintiff to the position of groundskeeper. After the criminal charges were dropped, the university voluntarily gave the plaintiff back pay. The plaintiff then brought suit, alleging that the university had violated his right to due process by suspending him without a hearing. In

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two cases, we limit our analysis to whether the District violated McMahon's predeprivation due process rights.

deciding against the plaintiff, the Supreme Court stated: "'[W]e have rejected the proposition that [due process] *always* requires the State to provide a hearing prior to the initial deprivation of property.' . . . [¶] . . . [¶] To determine what process is constitutionally due, we have generally balanced three distinct factors: [¶] 'First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest.'" (*Gilbert, supra*, 520 U.S. at pp. 930-932.) After applying the three factors, the *Gilbert* court concluded that the plaintiff was not entitled to a predeprivation hearing and had not been denied due process.

Applying the three factors in *Gilbert*, we conclude that McMahon was entitled to at least an informal predeprivation hearing.

The first factor favors McMahon. *Gilbert* noted that "in determining what process is due, account must be taken of 'the *length*' and '*finality* of the deprivation.'" (*Gilbert, supra*, 520 U.S. at p. 932.) Unlike the plaintiff in *Gilbert*, who was merely demoted, McMahon lost his job and his source of income. Also, our Supreme Court in *Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, 1119-1120 explained: "When loss of the vested right to continued state employment results from a disciplinary dismissal, the attendant stigma of the discharge may threaten the affected employee's future livelihood. For instance, a disciplinary discharge resulting from dishonesty or insubordination tarnishes the employee's good name and may therefore hamper the ability to obtain future employment. [Citations.]" Similarly, *Loudermill* stated: "[T]he significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood. [Citations.] While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job. [Citation.]" (*Loudermill, supra*, 470 U.S. at p. 543.) McMahon's

termination and the attendant stigma are so significant that they called for a predeprivation hearing.

Regarding the second factor, *Loudermill* is instructive. "[S]ome opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision. Dismissals for cause will often involve factual disputes. [Citation.] Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect. [Citations.]" (*Loudermill, supra*, 470 U.S. at p. 543.)

As indicated by *Loudermill*, disciplinary charges often involve factual disputes. McMahon did in fact have an opportunity to state his position in writing[8] before he was terminated, but there is no evidence that if he had submitted a statement that it would have been reviewed prior to his termination.[9] Also, although McMahon was given the

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8 As we have already indicated, the District informed appellant that he could respond to the notice of intent to dismiss in the manner provided by Government Code section 11506. Subdivision (a) of that statute provides: "[T]he respondent may file with the agency a notice of defense in which the respondent may: [¶] (1) Request a hearing. [¶] (2) Object to the accusation upon the ground that it does not state acts or omissions upon which the agency may proceed. [¶] (3) Object to the form of the accusation on the ground that it is so indefinite or uncertain that the respondent cannot identify the transaction or prepare a defense. [¶] (4) Admit the accusation in whole or in part. [¶] (5) Present new matter by way of defense. [¶] (6) Object to the accusation upon the ground that, under the circumstances, compliance with the requirements of a regulation would result in a material violation of another regulation enacted by another department affecting substantive rights."

9 We note that section 87671 provides that a contract or regular employee may be dismissed if the employee has been evaluated. Absent from section 87671 is any requirement that a community college review (formally or informally) an employee's substantive defense prior to termination. That section provides: "A contract or regular employee may be dismissed or penalized if one or more of the grounds set forth in Section 87732 are present and the following are satisfied: [¶] (a) The employee has been evaluated in accordance with standards and procedures established in accordance with the provisions of this article. [¶] (b) The district governing board has received all statements

option of presenting new matter or filing a simple form objection, he was never warned that by filing the form objection he would be giving up an important predeprivation right to defend himself. Accordingly, we conclude that McMahon did not have a meaningful opportunity to defend himself before his termination was effective. In other words, the procedure utilized created a risk that the District might erroneously deprive McMahon of his property interest.

Gilbert decided the second factor against the plaintiff only because of the felony arrest. "We noted in *Loudermill* that the purpose of a pre-*termination* hearing is to determine 'whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.' [Citation.] By parity of reasoning, the purpose of any pre-*suspension* hearing would be to assure that there are reasonable grounds to support the suspension without pay. [Citation.] But here that has already been assured by the arrest and the filing of charges." (*Gilbert, supra*, 520 U.S. at pp. 933-934.) Significantly, the District did not have the same type of reliable external indicia (the arrest) of the truth of the charges.

Loudermill is also instructive regarding the third factor. The *Loudermill* court concluded: "The governmental interest in immediate termination does not outweigh [the first two factors.] As we shall explain, affording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays. Furthermore, the employer shares the employee's interest in avoiding disruption and erroneous decisions; and until the matter is settled, the employer would continue to receive the benefit of the employee's labors. It is preferable to keep a qualified employee on than to train a new one. A governmental employer also has an

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of evaluation which considered the events for which dismissal or penalties may be imposed. [¶] (c) The district governing board has received recommendations of the superintendent of the district and, if the employee is working for a community college, the recommendations of the president of that community college. [¶] (d) The district governing board has considered the statements of evaluation and the recommendations in a lawful meeting of the board."

interest in keeping citizens usefully employed rather than taking the possibly erroneous and counterproductive step of forcing its employees onto the welfare rolls. Finally, in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay." (*Loudermill, supra*, 470 U.S. at pp. 544-545, fn. omitted.) Here, as in *Loudermill*, the governmental interest does not outweigh the first two *Gilbert* factors because giving an employee an informal hearing before dismissal does not saddle the District with a significant administrative burden or intolerable delays.

The District complains that the record is silent as to whether McMahon sought to address the board on November 18, 1996, or whether McMahon obtained an unidentified *Skelly* hearing prior to his administrative hearing. But these are nonissues. Even if McMahon had attended the November 18, 1996, board meeting, *Skelly* would not be satisfied because that meeting occurred before McMahon was given a copy of charges and notified that he had an opportunity to respond. If there was some other hearing that would satisfy *Skelly*, then it was incumbent upon the District to provide evidence of that below, and then refer to it on appeal. (See *People v. Sakelaris* (1957) 151 Cal.App.2d 758-759 ["On appeal, it is established . . . that no facts outside the record . . . can be considered."].)[10]

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10 Additionally, the District argues in a single sentence that the due process issue is not properly presented on appeal because McMahon did not argue it to the administrative law judge. We deem this undeveloped argument, which the District relegated to a footnote, to be waived. (See *Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 624, fn. 2.) Moreover, we point out that we cannot verify the District's position because, as we previously discussed, the reporter's transcript of the administrative hearing is not in the appellate record. Finally, an appellate court has the discretion to review an issue raised for the first time on appeal if it is a question of law on undisputed facts. (See *Ward v. Taggart* (1959) 51 Cal.2d 736, 742.) Because the facts are undisputed, and because a constitutional issue is presented, we would decide the issue even if it were being raised for the first time.

3. *McMahon is entitled to back pay.*

The remaining issue is the proper disposition of this appeal. As we discussed in section 1, *ante*, we find no error in the trial court's decision to uphold McMahon's dismissal by the District. Therefore, we affirm the judgment on that point. However, McMahon is entitled to be compensated for the *Skelly* violation. Pursuant to *Barber* and *Williams*, the remedy for a *Skelly* violation is an award of back pay from the time discipline was wrongfully imposed to the date the discipline is validated by a final decision following a hearing. (*Barber*, *supra*, 18 Cal.3d at p. 402; *Williams*, *supra*, 220 Cal.App.3d at p. 1217.) Here, McMahon's dismissal was wrongfully imposed on February 16, 1997, during which time it was constitutionally infirm. Once Rosenman issued his ruling on October 1, 1997, the infirmity was lifted, i.e., after October 1, 1997, the dismissal was constitutional.[11]

DISPOSITION

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11 In his supplemental briefs, McMahon contends that his dismissal should be reversed. We deem this argument beyond the scope of remand from the Supreme Court and need not reach it. (Cal. Rules of Court, rule 29.4(e) & (f).) Regardless, we would not be persuaded.

According to McMahon, the *Skelly* violation has not been cured because *Skelly* requires that an employee be given an opportunity to respond to the authority initially imposing the discipline. McMahon interprets this to mean that he must be allowed to respond to the District directly and that therefore the only possible disposition of this appeal is a complete reversal. However, McMahon did not cite any precedent on point. Significantly, under the statutory scheme of the Education Code, the District does not hold postdeprivation hearings. Rather, an arbitrator or an administrative law judge holds those hearings on the District's behalf. (See §§ 87674, 87675, 87678, 87679, & 87680.) In our view, because a postdeprivation evidentiary hearing was held, McMahon had an opportunity to respond to the authority initially imposing the discipline.

Also, McMahon argues that his postdeprivation rights to due process were violated and that *Barber* and *Williams* therefore do not apply. We note that McMahon has not cited any precedent establishing that a postdeprivation violation -- which is followed by a full evidentiary hearing -- would entitle him to more than the remedy prescribed by *Barber* and *Williams*. Whether the violation pre- or post-dates the termination, the violation is *temporary*, i.e., it only lasts until the discipline at issue has

The judgment is affirmed in part, reversed in part, and remanded for further proceedings. We leave McMahon's dismissal from his teaching position undisturbed, but instruct the trial court to award McMahon back pay from February 16, 1997, to October 1, 1997, to remedy the *Skelly* violation.

McMahon shall recover his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
NOTT

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been validated. In this case, as we already indicated above, in section 3, McMahon's dismissal was validated on October 1, 1997.